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No. 82-532

In the Supreme Court of the United States

OCTOBER TERM, 1982

EUGENE B. WEISS, PETITIONER

v.

ROBERT C. LEHMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in this personal damages action against a federal employee for an alleged violation of petitioner's due process rights in connection with the destruction of certain of his personal property left on federal land, the court of appeals correctly remanded the case to the district court to determine, in light of this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), whether meaningful pre-deprivation process was impractical.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 2

Carlson v. *Green*, 446 U.S. 14 ..... 5, 6

Harlow v. *Fitzgerald*, No. 80-945 (June 24, 1982) 8

Parratt v. *Taylor*, 451 U.S. 527 ..... 2, 3, 6, 7

Constitution, statutes and regulation:

United States Constitution:

Fifth Amendment 2

Due Process Clause 2

Eighth Amendment 5

Federal Tort Claims Act:

28 U.S.C. 1346(b) 3, 5

28 U.S.C. 2671 *et seq.* 3

28 U.S.C. 2680(a) 5

Page

Constitution, statutes and regulation—Continued:

Tucker Act:

28 U.S.C. 1346(a)(2) 2

28 U.S.C. 1491 2

42 U.S.C. 1983 3

36 C.F.R. 262.4 4

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OPINIONS BELOW

The first decision of the court of appeals (Pet. App. 18a-23a) is reported at 642 F.2d 265. The subsequent opinion of the court of appeals (Pet. App. 1a-14a), following remand by this Court (454 U.S. 807), is reported at 676 F.2d 1320. The judgment of the district court (Pet. App. 24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1982. A petition for rehearing was denied on June 28, 1982 (Pet. 2; Pet. App. 15a-16a). The petition for a writ of certiorari was filed on September 25, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed this *Bivens*-type action[1] in the United States District Court for the District of Idaho against respondent, an employee of the United States Forest Service, seeking damages for the destruction of certain equipment and metal objects. Those items had been left unattended for at least six years at an unpatented placer mining claim located on federal land. The materials originally belonged to a lessee of the claim, but they reverted to the mine claimants after the lease expired and were later traded to petitioner in return for property located elsewhere. Petitioner's interest in the property was not recorded (Pet. App. 2a, 19a).

In this damages action, petitioner claimed that respondent caused this property to be destroyed in violation of his due process rights under the Fifth Amendment. Respondent's motion for summary judgment was denied and the case was tried to a jury, which returned a verdict for petitioner and awarded damages totaling $1,000. The court of appeals affirmed, holding that it was not error to imply a damages remedy against respondent in his personal capacity for a violation of petitioner's rights under the Due Process Clause. In so holding, the court of appeals rejected respondent's contention that a damages remedy should not be implied because petitioner had an equally effective remedy against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, seeking just compensation for a taking of his property (Pet. App. 19a, 21a-23a, 26a-27a).

2. After the court of appeals' original affirmance of the judgment, but before the time for filing a petition for certiorari had expired, this Court rendered its decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981). In *Parratt*, a state prisoner

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[1]See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

sought to recover damages in a suit against a prison official under 42 U.S.C. 1983 for a violation of his due process rights in connection with the negligent loss of hobby materials. The Court concluded that "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process can, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, satisfy the requirements of procedural due process." 451 U.S. at 539. In *Parratt* itself, the Court held that the fact that the loss of the property was negligent made pre-deprivation process impractical, and the availability of a remedy against the State under the Nebraska Tort Claims Act was found to constitute adequate post-deprivation process. Accordingly, there was no due process violation. *Id.* at 541-544.

Respondent filed a petition for a writ of certiorari in this Court, contending that under the reasoning of *Parratt* v. *Taylor,* pre-deprivation process was equally impractical in this case and that the availability of a remedy under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, provided adequate post-deprivation process with respect to the loss of petitioner's property. On October 5, 1981, the Court vacated the judgment of the court of appeals and remanded the case to that court for consideration of petitioner's due process claim in light of *Parratt* v. *Taylor.* See 454 U.S. 807.

3. On remand, the court of appeals, by a 2-1 vote, vacated the judgment in favor of petitioner and remanded to the district court for further proceedings (Pet. App. 1a-14a). The court of appeals observed that under *Parratt* v. *Taylor,* there was no due process violation in this case if (i) meaningful pre-deprivation process was impractical, and (ii) an adequate post-deprivation remedy was available (*id.* at 3a).

The court of appeals found that it could not determine from the "limited record" before it whether meaningful pre-deprivation process was impractical in the particular circumstances of this case, noting that petitioner's allegations and the evidence offered in support of them permit a conclusion that respondent "acted no worse than negligently with respect to [petitioner's] ownership interest" (*ibid.*). The court observed that petitioner argued that the deprivation would not have occurred if petitioner had followed Forest Service procedures for the destruction of personal property, which provide for the impoundment and disposition of personal property after notice to the owner or, if the owner's name and address are unknown, after public notice (Pet. App. 3a, citing 36 C.F.R. 262.4). But, the court reasoned, "[s]ince removal of mere debris, such as an old, rusty car thought to be abandoned and worthless, would not require compliance with 36 C.F.R. Sec. 262.4, the asserted failure to comply here, based on the evidence in the record, would appear to have been no more than a negligent oversight" for which meaningful pre-deprivation process would be impractical under *Parratt* (Pet. App. 3a).

The court of appeals further observed that, as in *Parratt*, (451 U.S. at 543), petitioner did not argue that the Forest Service procedures themselves were inadequate. Moreover, the court concluded that the Forest Service cannot "reasonably be expected to provide notice before negligently departing from proper procedures by destroying property erroneously believed to be abandoned and worthless" (Pet. App. 4a). The court therefore remanded to the district court to afford petitioner an opportunity to pursue his due process claim by showing additional facts, such as intentional destruction of his property interest, that would make the *Parratt* limitation inapplicable (*id.* at 6a).

The court of appeals found the second part of the *Parratt* test — the existence of an adequate post-deprivation remedy — "more clearly satisfied" here, because of the existence of a remedy against the federal government under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.* The court rejected petitioner's argument that the FTCA remedy would not afford adequate post-deprivation process because the conduct complained of would fall within the "discretionary function or duty" exception to liability in 28 U.S.C. 2680(a) (Pet. App. 4a-5a).

ARGUMENT

The decision of the court of appeals remanding to the district court for further proceedings regarding the application of *Parratt* v. *Taylor* to the circumstances of this case is correct and does not warrant further review.

1. Petitioner contends (Pet. 8-9) that the decision of the court of appeals is inconsistent with the decision of this Court in *Carlson* v. *Green*, 446 U.S. 14 (1980). This argument is clearly misplaced. In *Carlson* v. *Green*, the Court rejected the argument that a cause of action for damages should not be recognized for an alleged violation of the Eighth Amendment by federal prison officials because the plaintiff had an adequate remedy against the United States under the FTCA. The issue thus was not whether the conduct complained of violated the constitutional rights of the plaintiff's decedent, but whether a cause of action for damages should be implied even assuming that there was a constitutional violation.

Here, in contrast, the issue is whether respondent's conduct even violated petitioner's constitutional rights. Under *Parratt*, if it is impractical to afford meaningful pre-deprivation process, and if there is adequate post-deprivation process for assessing the propriety of the governmental action by pursuing remedies under a compensation scheme

such as the FTCA or (as in *Parratt*) the Nebraska Tort Claims Act, then the individual has not been deprived of property without due process of law.This case does not involve the analytically quite distinct question involved in *Carlson* v. *Green*: whether, assuming that there has been a constitutional violation, a cause of action for damages should be implied against a federal official for that violation, in view of the existence of another remedy.[2]

2. Petitioner also argues (Pet. 10-11) that the court of appeals erred in its consideration of whether meaningful pre-deprivation process was "impractical" in the circumstances of this case. This fact-bound contention does not warrant review, especially since the court of appeals merely remanded to the district court for further proceedings on the issue (Pet. App. 3a-4a, 6a).

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[2]Petitioner's contention (Pet. 9) that the FTCA is not an adequate remedial scheme for these purposes is wholly without merit. In *Carlson* v. *Green*, the Court, in support of its conclusion that Congress did not intend to limit the plaintiff in that case to an FTCA remedy, observed that a *Bivens* action serves a deterrent function that may not be present in an FTCA suit and that a jury trial and punitive damages are not available in an FTCA suit. 446 U.S. at 20-23. But the Court in *Parratt* specifically rejected the argument that these attributes of the remedies under the state compensation scheme rendered those remedies inadequate for due process purposes. 451 U.S. at 543-544.

The other indicium of congressional intent cited in *Carlson* v. *Green* — that FTCA liability is governed by state law, while the liability of federal officials "for violations of citizens' constitutional rights" should depend upon a uniform federal rule (446 U.S. at 23) — likewise has no bearing on this case. The question here is not whether federal officials should be liable for a constitutional violation, but whether there has been a constitutional violation at all. Petitioner does not argue that recovery was unavailable under the FTCA. Whether such recovery is based on a uniform federal law or incorporated state law is irrelevant for purposes of the due process issue, because the remedies under the FTCA "could have fully compensated [petitioner] for the property loss he suffered" (*Parratt* v. *Taylor*, *supra*, 451 U.S. at 544) and therefore are "sufficient to satisfy the requirements of due process" (*ibid.*).

After reviewing what it termed the "limited record" on this issue, the court of appeals found that petitioner's allegations and the evidence offered in support of them permitted the conclusion that respondent "acted no worse than negligently with respect to [petitioner's] ownership interest," because petitioner's failure to comply with the procedures in the regulations with respect to the particular property involved "would appear to have been no more than a negligent oversight" (Pet. App. 3a). Petitioner's ownership interest in the property was not recorded, and he did not allege that respondent or any other Forest Service employee knew of his interest or that petitioner acted with the intent to destroy property known or thought to belong to another person (*id.* at 2a), as distinguished from abandoned or worthless property. As the court of appeals observed on the basis of this finding (*id.* at 4a), the Forest Service cannot reasonably be expected to publish notice before destroying abandoned and worthless property,[3] or to provide notice whenever one of its employees negligently departs from established procedures before destroying property erroneously believed to be abandoned or worthless (*ibid.*).

If respondent's conduct with respect to petitioner's ownership interest in the property was merely negligent, it was "impractical" here for the government to provide meaningful pre-deprivation process, just as it was in *Parratt* v. *Taylor*. See 451 U.S. at 541. In such circumstances, the opportunity for a post-deprivation remedy under the FTCA would have afforded petitioner adequate process.

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[3]Petitioner does not dispute that the Forest Service need not furnish notice before destroying abandoned and worthless property; he asserts only that petitioner's decision not to do so in the circumstances of this case was "unreasonably wrong" (Pet. 10). The quoted phrase alleges only negligent conduct.

In any event, petitioner is not barred from recovery under the court of appeals' decision. The court of appeals remanded for further proceedings in which petitioner will have the opportunity to show that meaningful pre-deprivation process was not impractical in this case.

3. Petitioner contends (Pet. 11-12) that the court of appeals' holding that meaningful pre-deprivation process was impractical if respondent acted only negligently with respect to petitioner's property interest is inconsistent with this Court's holding in *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982). This contention is frivolous. In *Harlow* v. *Fitzgerald*, the Court held that an objective test should govern the availability of the qualified immunity defense to a personal damages action for an alleged violation of constitutional rights. Slip op. 14-18. The issue decided by the court of appeals in this case, in contrast, did not concern qualified immunity from liability for a constitutional violation, but rather whether there was a constitutional violation at all if meaningful pre-deprivation process could not reasonably have been provided.

Indeed, to the extent that *Harlow* v. *Fitzgerald* is relevant here, it further supports the court of appeals' vacating of the judgment against respondent. As petitioner acknowledges (Pet. 7), the jury was instructed that in order for respondent to be protected by qualified immunity, it had to find that he acted reasonably and in good faith. The latter part of the instruction is inconsistent with this Court's decision in *Harlow* v. *Fitzgerald* abandoning the subjective element of the qualified immunity defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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